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December 17, 2012

BY HAND

Ms Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

ENTERED
Office of Proceedings

DEC 17 2012

Part of
Public Record



Re STB Finance Docket No. 35557, Reasonableness of BNSF Railway Company
Coal Dust Mitigation Tariff Provisions

Dear Ms Brown:

On behalf of Union Pacific Railroad Company, enclosed for filing in the
above referenced docket are:

1. The unbound original and ten copies of the Rebuttal Evidence and Argument of Defendant Union Pacific Railroad Company
2. Three copies of an identical CD containing a HIGHLY CONFIDENTIAL Electronic Addendum to the Rebuttal Evidence and Argument of Defendant Union Pacific Railroad Company.

An additional paper copy of our filing is enclosed. Please return date-stamped copies to our messenger

Thank you for your attention to this matter

Sincerely,

Spencer F. Walters

Spencer F Walters

Enclosure

cc: Parties of Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 35557

REASONABLENESS OF BNSF RAILWAY COMPANY
COAL DUST MITIGATION TARIFF PROVISIONS



REBUTTAL EVIDENCE AND ARGUMENT
OF UNION PACIFIC RAILROAD COMPANY

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December 17, 2012

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 35557

REASONABLENESS OF BNSF RAILWAY COMPANY
COAL DUST MITIGATION TARIFF PROVISIONS

**REBUTTAL EVIDENCE AND ARGUMENT
OF UNION PACIFIC RAILROAD COMPANY**

On reply, the parties opposing the coal dust mitigation tariff issued by BNSF Railway Company ("BNSF") largely repeat the flawed arguments they made in their opening comments. Specifically, the "Coal Shippers" and Arkansas Electric Cooperative Corporation ("AECC") dispute whether the loss of coal dust from rail cars in transit affects rail safety,¹ topper agents have proven effective at preventing the loss of coal dust from rail cars in transit,² coal shippers should bear the costs of loading coal so it remains in rail cars,³ and it is reasonable for a tariff not to contain penalties for non-compliance.⁴

Union Pacific Railroad Company ("Union Pacific") already addressed each of these issues in its reply comments. Union Pacific's reply showed that.

¹ See Arkansas Electric Cooperative Corporation's Reply Evidence and Argument ("AECC Reply") at 19-22.

² See Reply Evidence and Argument of Western Coal Traffic League, American Public Power Association, Edison Electric Institute and National Rural Electric Cooperative Association ("Coal Shippers Reply") at 5-12; AECC Reply at 13-15.

³ See Coal Shippers Reply at 12-17; AECC Reply at 15-17.

⁴ See Coal Shippers Reply at 17-20.

- the Board has concluded that coal dust is a “particularly harmful ballast foulant,”⁵ and the U.S. Department of Transportation agrees that “coal dust threatens railroad safety more than other foulants, and that its emissions should be contained”;⁶
- the record shows that the application of certain topper agents significantly reduces coal dust losses from trains in transit;⁷
- Board precedent establishes that shippers are responsible for the costs of loading their freight into rail cars and ensuring that the freight remains in the cars during normal railroad operations,⁸ and
- Board precedent does not require tariffs to contain penalties for non-compliance.⁹

Rather than restate its evidence and argument in this rebuttal filing, Union Pacific refers to Board to its Reply Evidence and Argument, filed on November 15, 2012

However, in the course of repeating its arguments, AECC makes two new claims that warrant a brief response.

First, AECC asserts that the Board lacked support for its conclusion in *Arkansas Electric Cooperative Corp. – Petition for Declaratory Order*, FD 35305, that coal dust is a particularly harmful ballast foulant because the Board relied in part on comments from the Department of Transportation and certain documents that the Department referenced in its comments did not specifically address coal dust (AECC Reply at 19-22.) However, the Board was justified in

⁵ Reply Evidence and Argument of Union Pacific Railroad Company (“UP Reply”) at 5 (quoting *Arkansas Elec Coop Corp. – Petition for Declaratory Order*, FD 35305, slip op. at 6 (STB served Mar. 3, 2011)).

⁶ *Id.* at 6 (quoting Opening Comments of the United States Department of Transportation at 4).

⁷ See *id.* at 3-4. In an attempt to argue that topper agents do not work, AECC included dozens of photographs of rail cars that were treated with topper agents in its reply, but BNSF’s analyses of the data gathered from those rail cars show that use of approved topper agents reduced in-transit coal dust losses by at least 85%. See BNSF Railway Company’s Reply Evidence and Argument, Reply Verified Statement of William VanHook at 3-10. In other words, regardless of the cars’ physical appearances, the data show that the approved topper agents worked.

⁸ UP Reply at 7-9.

⁹ See *id.* at 9-10.

relying on the Department's comments, which reflected the Department's review of the record developed by BNSF and Union Pacific, the Federal Railroad Administration's expertise, and the literature regarding ballast stability.¹⁰ Moreover, even setting aside the Department's comments, the Board's conclusion that coal dust is a particularly harmful ballast foulant was abundantly supported by the evidence submitted by BNSF and Union Pacific.¹¹

Second, AECC asserts that requiring coal shippers to pay the costs of loading their coal to prevent the loss of coal dust in transit means that coal traffic will be cross-subsidizing other rail traffic (AECC Reply, Reply Verified Statement of Michael A. Nelson at 14.) However, AECC has it backwards. Shippers of other commodities bear the costs of loading their cars to prevent their products from spilling or leaking in transit, so requiring coal shippers to bear the costs of safely loading their coal will place them on an equal footing with other shippers, removing an existing cross-subsidy. AECC also has it backwards when it asserts that requiring coal shippers to pay for topper agents would "have the effect of increasing BNSF's contribution from PRB traffic" (and, by implication, increasing Union Pacific's contribution from PRB traffic as well). (*Id.*) Under AECC's scenario, which involves a coal shipper with a rate constrained by the 180% R/VC jurisdictional threshold, BNSF should be able to increase its rate by \$1.80 for every \$1.00 in variable costs that it incurs to apply topper agents—generating more contribution for BNSF. By contrast, if the shipper pays directly for the costs of applying topper agents, BNSF could not

¹⁰ See Reply Comments of the United States Department of Transportation at 2, *Ark. Elec. Coop. Corp. – Petition for Declaratory Order*, FD 35305 (Apr. 30, 2010); Rebuttal Comments of the United States Department of Transportation at 2-3, *Ark. Elec. Coop. Corp. – Petition for Declaratory Order*, FD 35305 (June 4, 2010).

¹¹ In *Arkansas Electric*, Union Pacific addressed the pernicious nature of coal dust in the opening verified statement of David Connell, the reply verified statement of Dexter McCulloch, and the rebuttal verified statements of David Connell and Dexter McCulloch. Union Pacific has included copies of these statements in an electronic addendum to this document.


increase its rate (or its contribution). So why is AECC arguing that BNSF should pay? Under the Board's rules for rate cases, a carrier's variable costs of serving a complaining shipper are calculated using system-average costs, so if a rail carrier's costs of applying topper agents were treated the same way as other variable costs (as AECC apparently hopes they would be), the cost would be spread across all of the carrier's traffic, not applied solely to the costs of serving a complaining coal shipper. In other words, AECC wants shippers of all other commodities to subsidize coal shippers' loading costs.¹²

BNSF's current coal dust mitigation tariff effectively addresses all of the issues that led the Board to reject BNSF's prior tariff in *Arkansas Electric*. The tariff contains an activity-based safe harbor that involves use of proven, commercially available technologies, while encouraging the pursuit of lower-cost alternatives. No tariff opponent offered any evidence that BNSF could have adopted a less costly but equally or more effective safe harbor. Instead, the opposition to BNSF's tariff reflects continued resistance to the Board's conclusion in *Arkansas Electric* that rail carriers may adopt reasonable loading requirements to help contain coal dust in rail cars. Union Pacific urges the Board to act promptly to affirm BNSF's right to adopt the rules in its coal mitigation tariff.

¹² AECC's position adds insult to injury. Unless coal dust is contained in rail cars, shippers of non-coal traffic that share lines with PRB coal will have their trains delayed as a result of the more frequent ballast undercutting and other maintenance activity associated with removing coal dust from the affected lines. See Opening Evidence and Argument of Union Pacific Railroad Company, Verified Statement of David Connell at 16-17, *Ark. Elec. Coop. Corp. – Petition for Declaratory Order*, FD 35305 (Mar. 16, 2010); See Reply Evidence and Argument of Union Pacific Railroad Company, Reply Verified Statement of Douglas Glass at 5-7, *Ark. Elec. Coop. Corp. – Petition for Declaratory Order*, FD 35305 (Apr. 30, 2010).

Respectfully submitted.

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December 17, 2012

CERTIFICATE OF SERVICE

I, Spencer F Walters, certify that on this 17th day of December, 2012, I caused a copy of the Rebuttal Evidence and Argument of Union Pacific Railroad Company to be served by first-class mail, postage prepaid, on all parties of record in this proceeding.

Spencer F. Walters
Spencer F. Walters